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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DAVID CURIEL,

Plaintiff and Appellant,

v.

BOARD OF CIVIL SERVICE
COMMISSIONERS FOR THE CITY OF
LOS ANGELES,

Defendant and Respondent;

CITY OF LOS ANGELES,

Real Party in Interest.

B216442

(Los Angeles County
Super. Ct. No. BS113656)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Yaffe, Judge. Affirmed.

Law Offices of Stephen J. Horvath and Stephen J. Horvath for Appellant.

Carmen Trutanich, City Attorney, Kelly M. Martin and Patricia Almon, Deputy City Attorneys, for Respondent and Real Party in Interest.

David Curiel appeals from the denial of his petition for administrative mandamus challenging his termination as a police officer by the Los Angeles Airport Police Department (Department). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of June 28, 2001, Curiel served as Deputy Alban Waters's field training officer. In that capacity, Curiel sat in the passenger seat of the police cruiser and directed Waters where to go as he drove, how to spot criminal activity and advised him to be aware of his geographic location at all times. Curiel became frustrated with Waters that night because Waters was repeatedly unaware of his geographic location and failed to spot potential criminal activity.

In the course of their patrol, Curiel and Waters drove outside the boundary of their assigned patrol area, where they detained three teenage girls who were out past curfew. Concerned that they were outside of the patrol area, Curiel told his superior officer, Daniel Romo, that they had been pursuing a speeding vehicle that was traveling north on Sepulveda Boulevard. Waters later advised his superiors that there had not been any speeding vehicle, contrary to Curiel's assertion. Nevertheless, Waters included the pursuit of the speeding vehicle in his written report of the incident because Curiel directed him to do so.

After an internal investigation, Curiel was terminated from his position for: being outside his authorized area when he cited three juveniles for curfew violations; making false statements in reporting the incident; and instructing the officer that he was training to include false information in an official Department record. Curiel appealed his termination before the Board of Civil Service Commissioners for the City of Los Angeles (Commission), which upheld the termination upon the recommendation of a hearing examiner, who heard testimony from 18 witnesses. Curiel then filed a petition for writ of mandamus at the Los Angeles Superior Court. The trial court conducted an independent review of the administrative record, made specific factual findings consistent with the facts described above, and ultimately denied the petition.

On appeal, Curiel contends that the trial court's factual findings were incorrect. Curiel testified during the administrative hearing, and continues to assert, that he observed a vehicle speed across the intersection of Manchester Avenue and Sepulveda Boulevard while he and Waters were traveling on Manchester within the patrol area. Curiel asked Waters if he saw the speeding vehicle, and Waters responded that he did not. Curiel then told Waters to turn onto Sepulveda Boulevard to pursue the northbound vehicle, but by the time they caught up, he was uncertain whether this was the same vehicle. Waters ran a check on the license plate on the vehicle pursuant to Curiel's instruction, but made a mistake in reading the license plate and had to run it again. The license plate came back with "no want, no warrant."

As a result, they headed back south on Sepulveda Boulevard, where they detained the three girls who were out past curfew. Waters told Curiel that he had not noticed the three girls before. At the police station, Curiel told Officer Waters to write an employee's report about the detention. Curiel became frustrated when Waters took too long to write the report and orally dictated the report to Waters, including the pursuit of the speeding vehicle. Curiel testified that he told Waters throughout the night that he would receive an unsatisfactory review given his inability to perform simple tasks or observe potential criminal activity. Curiel suggested that Waters lied about the incident to avoid getting an unsatisfactory review from Curiel.

DISCUSSION

Curiel argues that the factual findings made by the trial court are not supported by substantial evidence, Curiel was deprived of a fair hearing due to procedural abuses made by the Commission, and employment termination was an excessive penalty.

I. Standard of Review

Section 1094.5 of the Code of Civil Procedure sets out the procedure for obtaining judicial review of a final administrative determination by writ of mandate. In cases like this, involving the fundamental right to employment, the trial court is directed to use its independent judgment in reviewing the evidence where it is claimed that the findings of at the administrative hearing were not supported by the evidence. The California

Supreme Court has clarified that the independent judgment review standard accords a strong presumption of correctness to administrative findings and that the burden rests upon the complaining party to show that the administrative decision is contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 810-811.) The standard of review on appeal of the trial court's determination is the substantial evidence test. (*Ibid.*)

II. Substantial Evidence Supports a Finding of Dishonesty

Curiel asserts that the “critical factual issues in this case revolve around the believability of appellant versus his accuser trainee Waters.” Because Waters's testimony was “inconsistent, confused, and biased[,]” Curiel argues there is no substantial evidence to support a finding of dishonesty. Relying on his own testimony, Curiel provides alternate explanations for what occurred: namely, that Waters was incompetent as a police officer since he was unable to observe and recollect important events and lied to avoid a bad review. According to Curiel, he “faced no possibility of disciplinary sanctions” for being out of his patrol area and therefore, had no motive to lie.

Despite Curiel's best attempts to cast the evidence in the most favorable light, we are not in a position to re-try this matter. The case primarily relied upon by Curiel to support his argument, *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150 (*Salenko*), underscores our position. In *Salenko*, the civil service commission reversed the termination of a sheriff's deputy for filing a false report and reduced the penalty to a demotion and 90-day suspension. The trial court denied a petition for writ of mandate filed by the San Diego County Sheriff Department. The Court of Appeal affirmed, finding that substantial evidence supported the commission's conclusions and the trial court's decision. (*Id.* at pp. 1152-1154.) The deputy testified that he made a number of mistakes on the report but did not intend to falsify any information in the report. The commission believed him. (*Id.* at p. 1155.) On review, the Court of Appeal deferred to the commission's findings. (*Ibid.*)

As the *Salenko* court explained, “The hearing officer was in the best position to observe the witnesses’ demeanors and assess their credibility.” (*Salenko, supra*, 132 Cal.App.4th at p. 1154.) “ ‘[N]either conflicts in the evidence nor “ ‘testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” ’ [Citation.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., ‘ “unbelievable per se,” ’ physically impossible or ‘ “wholly unacceptable to reasonable minds.” ’ [Citation.]” (*Id.* at p. 1155.)

Similarly, substantial evidence supports the conclusions reached by the trial court after its independent review of the hearing examiner’s findings. The trial court found that Curiel was concerned about being outside of the patrol area because he became upset when Waters reported their location. Further, Curiel told Waters to include false information in his report about pursuing a vehicle to justify their location at the time of the detention.

Substantial evidence supports the trial court’s finding that Curiel failed to meet his burden to overcome the presumption that the administrative findings were correct. Indeed, the hearing examiner reviewed 40 exhibits and heard testimony from 18 witnesses. The trial court found it proper for “the Commission to believe the testimony of Waters and to disbelieve the testimony of [Curiel]. The Commissioners relied upon the recommendation of the hearing officer who observed the demeanor of the witnesses when they testified.”

III. Procedural Irregularities Do Not Serve as Grounds for Reversal

During the administrative hearing, Curiel moved to dismiss the charges against him, contending he was denied procedural due process rights as a result of the actions of the deputy city attorney who represented the Department in the matter. The hearing examiner recommended the motion be granted, finding that the deputy city attorney interfered with Curiel’s right to cross-examine a witness by asserting nonexistent privileges. The deputy city attorney also undermined the hearing examiner’s authority by

refusing to abide by her rulings and sought to be present during an in camera review in connection with a *Pitchess* motion on Waters's personnel records. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) Her actions resulted in the unjustified delay of the hearing. The Commission denied the motion to dismiss and remanded the case back to the hearing examiner for further proceedings. At the hearing before the Commission, both parties were found to be at fault for the delays. The city attorney's office agreed to replace the recalcitrant deputy city attorney.

Though he abandoned the argument at the trial level, Curiel now repeats his contention that "[a] large body of serious procedural irregularities . . . deprived Curiel of fundamental fairness in the termination proceedings." Beyond citing to his 50-page motion to dismiss, however, Curiel fails to specifically identify on appeal which procedural irregularities deprived him of due process. Indeed, the trial court found that Curiel made "no showing in this court that he was prejudiced to any extent by such misconduct, and the court therefore finds that he received a fair trial at the administrative level as prescribed by Code of Civil Procedure section 1094.5[, subdivision] (b)."

Instead, Curiel contends that the Commission's decision to deny the motion to dismiss, against the hearing examiner's recommendation, was erroneous because it mistakenly believed it had no jurisdiction to dismiss the matter. It is clear from the record that while the Commission believed it lacked jurisdiction, it would have denied the motion in any event. The commissioners placed the blame for the delays on both parties and refused "to dismiss a case where we haven't even heard the evidence yet." Further, Curiel does not contend that he was deprived of due process rights after the deputy city attorney was replaced. Nor does he contend that the procedural requirements for the discipline of permanent civil servants detailed in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 were not met. In fact, he stipulated to the fact that the due process provisions of *Skelly* had been met.

Curiel further contends the Commission failed to read his motion and did not permit a reasonable opportunity for him to be heard on the jurisdictional issue. However, the record reflects that the commissioners were very familiar with the issues presented in

the motion to dismiss, including reading portions of the transcripts and the hearing examiner's interim report, in preparation for the hearing. Moreover, Curiel's argument that the Department deliberately withheld Waters's training records is unsupported by the facts. Waters's personnel file was reviewed in camera pursuant to a *Pitchess* motion. The hearing examiner concluded that there were no written evaluations of Waters by Curiel in the record. Accordingly, Curiel has failed to show any prejudice resulting from a denial of due process in the administrative proceeding.

IV. Termination Was Not an Excessive Penalty

Asserting that termination was an excessive penalty, Curiel relies on two related cases, *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 716 (*Berry*) and *Salenko, supra*, 132 Cal.App.4th at page 1150, for the proposition that his actions did not warrant termination. In *Berry*, the termination of a deputy was upheld where he deliberately lied about the abuse of an inmate to protect a fellow officer. (*Berry, supra*, at pp. 719-722.) By contrast, the termination of a deputy in *Salenko* was reversed where it was found he had merely made careless factual errors in his report, rather than intentional falsehoods. (*Salenko, supra*, at p. 1155.)

Curiel's argument presupposes that there was no finding of intent to deceive. However, the hearing examiner found by a preponderance of the evidence that Curiel lied to his superior officer and ordered Waters to falsify a police report. As discussed above, we find substantial evidence supports this conclusion. Accordingly, Curiel's case is much closer to the intentional deception found in *Berry* than the careless error found in *Salenko*.

We also reject Curiel's argument that a lack of prior discipline and absence of serious public harm are mitigating factors to consider in this case. (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230.) Here, the record shows that Curiel has a history dating back to 1992 of verbal warnings, including two records of counseling for being out of area. He was also previously suspended based upon allegations that purportedly were very similar to those addressed in this matter. Moreover, it is undisputed that "[d]ishonesty is incompatible with the public trust." (*Id.* at p. 231.) This

is especially true when it is found that a police officer not only lied to his superiors, but directed a trainee under his control to do so as well.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.